IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JORDAN M. DIXON, Appellant.	No. 39466-9-II ORDER CORRECTING CAPTION

The opinion filed for publication on December 7, 2010, is amended as follows:

On page 1, the caption "Published Opinion" is changed to "Unpublished Opinion."

IT IS SO ORDERED.

DATED this ____ day of December, 2010.

For the court: Jj. Van Deren, Hunt.

_____
Armstrong, P.J.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JORDAN M. DIXON, Appellant.	No. 39466-9-II PUBLISHED OPINION

Van Deren, J. — Jordan Dixon appeals his conviction for attempted second degree robbery. He argues that we should reverse his conviction based on: (1) the trial court's omission of the "knowledge" element from its accomplice liability instruction; (2) the trial court's violation of the confrontation clause by admitting testimonial hearsay; (3) prosecutorial misconduct; and (4) cumulative error. The State concedes that the trial court erred in failing to include the "knowledge" element in the accomplice instruction, but argues that it is harmless. We hold that the trial court's omission of the "knowledge" element was not harmless error and reverse Dixon's conviction and remand to the trial court for further proceedings.

FACTS

On April 13, 2009, Eric Calloway saw Dixon and Jason Thomas approaching him as he was returning to his Hoquiam residence. Calloway had met Dixon previously and recognized him

and the sound of his voice. After exchanging greetings, Calloway continued walking. He then heard someone behind him say, "Empty your pockets." Report of Proceedings (RP) at 13.

Calloway testified that he was not sure who had spoken, but he believed he recognized Dixon's voice. Calloway turned around and said, "F*** you." RP at 14. First, one man swung at him and then the other joined in the assault. Calloway did not recall which man swung first. Calloway backed away and dialed 911 on his cellular telephone. He ran toward his residence and pounded on the window, breaking the window in an attempt to get his father's attention. Then, Dixon and Thomas fled the scene and Calloway gave chase. He pursued Thomas, eventually catching and scuffling with him until police officers arrived.

After taking Thomas into custody, Hoquiam Police Detective Shane Krohn assembled a photograph montage including a "possible [suspect]" based on Calloway's description of Thomas's companion during the incident. RP at 72. This "possible [suspect] turned out . . . not [to be] the correct person." RP at 72. Krohn testified that, after Thomas identified Dixon as his companion, police officers unsuccessfully attempted to contact Dixon at his last known address. They spoke with Dixon's mother and told her to have him contact the police department if he returned. Dixon did not object to this testimony at trial.

Later the same day, Dixon arrived at the police station and asked "why [the police] were looking for him." RP at 66. Krohn testified that, after Dixon waived his *Miranda*[1] rights, Dixon said that he had been with Thomas that night and that Thomas had "started something" by "ha[ving] words" with Calloway and swinging at him. RP at 76. Dixon executed a written statement to the same effect, adding that he did not understand what Thomas was going to do to

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Calloway. In the statement Dixon asserted that he never hit anyone or took anyone's property and that he "took off running" when Calloway broke the window because he was "scared." Ex. 1 at 1. The next day, Krohn assembled a second photograph montage that included Dixon's picture. Calloway identified Dixon as Thomas's companion.

The State charged Dixon with attempted second degree robbery. During trial, defense counsel asked Krohn the following questions:

[DEFENSE COUNSEL:]	. . . [W]as [Dixon] cooperative, would you say?
[KROHN:]	The fact that he came in on his own.
[DEFENSE COUNSEL:]	Yeah.
[KROHN:]	Yes.
. . . .	
[DEFENSE COUNSEL:]	He wanted to give his side of the story and he waived the right to an attorney and all of that stuff?
[KROHN:]	Yes.
[DEFENSE COUNSEL:]	So he didn't hide behind, [h]ey, I want to talk to my attorney first, he just gave you a statement?
[KROHN:]	Yes.

RP at 78-79.

Before jury deliberations, the prosecutor indicated that he wanted the trial court to instruct on accomplice liability. The trial court gave the jury the following instruction:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Clerk's Papers at 10. The trial court also instructed the jury that it was the sole judge of credibility, that the lawyers' statements and arguments were not evidence, that it was to disregard any arguments or statements unsupported by the evidence or the trial court's instructions, that the defendant was not required to testify, and that the jury could not infer any evidence of guilt from the defendant's choice not to testify.

During closing argument, the prosecutor stated, "But Mr. Calloway has sat before you in this chair and told you a story and every person that sits in this chair deserves to be believed until the[y] prove themselves uncredible [sic]." RP at 88. Dixon did not object. The prosecutor also told the jury that it did not have to "sort out th[e] details" of who threw the first punch or who was the primary aggressor because of the accomplice liability instruction. RP at 88.

Later, when referring to Dixon's statement to the police, the prosecutor also argued without objection:

> Why would he leave if he wasn't guilty of something? Ask yourself when is the last time that you just ran away from the scene of the crime when you had nothing to do with the crime at all? Flight is the ultimate evidence of one's own knowledge of his guilt. Only after three hours does [Dixon] decide to come in and tell his version of the story. Time enough to think up a version of the story. Time enough to get it straight in your head. Innocent people stay on the scene and cooperate with the police. They don't wait around to see if the police actually have developed them as a suspect. They don't wait around until they find out that the police, in fact, know[their] name. Innocent people wait on the scene and help the police.

RP at 89. The prosecutor further argued without objection:

> So that's what you have, you have a credible person sitting in this chair and [the complaining witness]'s credibility is open for you to determine . . . [b]ut more than that we have an independent identification that he made to the police as one of his assailants. He made that identification here in the courtroom as well and the defendant left the scene of the crime.

RP at 89-90.

During closing, defense counsel argued, "Who was the intoxicated one as between Mr. Thomas and Mr. Dixon? Who has the police officer saying – testifying under oath, yeah, he was intoxicated. He was clearly intoxicated. Is that Mr. Dixon or Mr. Thomas?"[2] RP at 97. During rebuttal, the prosecutor stated, "We probably could determine whether . . . Dixon was intoxicated . . . if he would [sic] not have left the scene of the crime." RP at 101. The trial court overruled defense counsel's objection. The prosecutor continued without objection, "[Defense counsel] clearly has asked you to compare the two people, Jordan Dixon to Mr. Thomas. He said that Thomas was intoxicated. I guess he is assuming that . . . Dixon wasn't, but you will not know that because he left the scene of the crime." RP at 102.

The jury convicted Dixon of attempted second degree robbery. He appeals.

DISCUSSION

I. Accomplice Liability Instructions

Dixon argues that the trial court's failure to include the knowledge element in the accomplice instruction was reversible error, entitling him to a new trial. We agree.

A. Manifest Error

Dixon raises this claim for the first time on appeal. Failure to object to jury instructions at trial usually constitutes waiver of any error, precluding review for the first time on appeal. RAP 2.5(a). But due process requires the State to prove every element of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; *In re Matter of Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Jury instructions that relieve the State of its burden to prove

[2] The record does not reflect the relevance of any of the testimony about Thomas's intoxication elicited by defense counsel at trial. Defense counsel elicited this testimony without objection.

every element of an offense violate due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). Thus, such errors affect a constitutional right and may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Chino*, 117 Wn. App. 531, 538, 72 P.3d 256 (2003).

B. Omitted Element

Dixon contends that the omission of the "knowledge" element from the trial court's jury instruction on accomplice liability relieved the State's burden of proving every element of the crime. The State concedes this error, but it argues that the error was harmless.

RCW 9A.08.020(3) provides in pertinent part:

> A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he
> (i) solicits, commands, encourages, or requests such other person to commit it; or
> (ii) aids or agrees to aid such other person in planning or committing it.

RCW 9A.08.020(3) establishes a mens rea requirement of "knowledge" of "the crime." *State v. Roberts*, 142 Wn.2d 471, 510, 14 P.3d 713 (2000). Here, Dixon is correct that the trial court erroneously omitted the knowledge element of the accomplice instruction from its jury instructions.

C. Harmless Error

We review jury instruction errors for constitutional harmless error. *State v. Berube*, 150 Wn.2d 498, 505, 79 P.3d 1144 (2003). A constitutional error is harmless if it appears "beyond a reasonable doubt that the error did not contribute to the ultimate verdict." *Berube*, 150 Wn.2d at

505. "'When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence.'" *Berube*, 150 Wn.2d at 505 (quoting *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)). But if "the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless." *Neder v. United States*, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *see also State v. Jennings*, 111 Wn. App. 54, 64, 44 P.3d 1 (2002) (stating the same). Thus, "a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is 'no,' holding the error harmless does not 'reflec[t] a denigration of the constitutional rights involved.'" *Neder*, 527 U.S. at 19 (alteration in original) (quoting *Rose v. Clark,* 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 460 (1986)).

Here, Dixon challenged the omitted knowledge element with his statement that, although he was present during these events, he did not know Thomas would attempt to rob Calloway. This evidence was sufficient, if deemed credible by the jury, to support a finding that he had no knowledge of the attempted robbery before it occurred, thus relieving him of accomplice liability. Furthermore, although the State contends that the error was harmless because the jury could have convicted Dixon as a principal, as opposed to an accomplice—making the accomplice instruction unnecessary—the State requested the accomplice instruction. And the prosecutor argued during closing that the jury need not "sort out th[e] details" of Calloway's testimony because of the accomplice liability instruction. RP at 88. Because the State urged the jury to rely on this

erroneous instruction, we cannot be certain beyond a reasonable doubt that it did not contribute to the verdict. Accordingly, this error was not harmless. We reverse Dixon's conviction and remand for a new trial.[3] We address other issues Dixon raises that may arise on retrial.

II. Confrontation Clause

Dixon argues that Krohn's testimony about what Thomas told him violates Dixon's right to confront witnesses against him. We disagree.

Dixon also raises this claim for the first time on appeal. RAP 2.5(a) generally does not allow parties to raise claims for the first time on appeal. But RAP 2.5(a)(3) allows appellants to raise claims for the first time on appeal if such claims constitute manifest constitutional error. In order to establish manifest constitutional error allowing appellate review, appellants must demonstrate actual prejudice resulting from the error. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). "'Essential to this determination is a plausible showing . . . that the asserted error had practical and identifiable consequences in the trial.'" *Kirkman*, 159 Wn.2d at 935 (internal quotation marks omitted) (quoting *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

In *State v. Kronich*, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007), our Supreme Court held that a confrontation clause violation was "manifest" because, had it been raised at trial, the challenged statement would have been excluded, thus fatally undermining the State's case. But here, Dixon did not challenge whether probable cause supported his arrest in connection with this crime. Further, Dixon's connection with this crime was undisputed, as Dixon voluntarily admitted

[3] Dixon also contends that defense counsel's failure to object to the accomplice liability instruction was ineffective assistance of counsel. Because we resolve his appeal on this ground, we do not consider the ineffective assistance of counsel claim.

to the police that he was present. "Evidence that is merely cumulative of overwhelming

untainted evidence is harmless." *State v. Flores*, 164 Wn.2d 1, 19, 186 P.3d 1038 (2008). Thus, Thomas's statement is merely cumulative because of Dixon's properly admitted statement that he was with Thomas during these events and any confrontation clause violation was harmless. Thus, we hold that, even assuming there was an error, this error is neither manifest nor subject to our review.

III. Prosecutorial Misconduct

Dixon further contends that the prosecutor committed prosecutorial misconduct during closing argument by (1) commenting on Dixon's prearrest silence and decision not to testify at trial, (2) arguing that the jury should presume Calloway was credible until proven otherwise, and (3) arguing that the jury could have determined whether Dixon was intoxicated if he had not left the scene of the crime.

A. Standard of Review

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecutor has wide latitude in making arguments to the jury and may draw reasonable inferences from the evidence. *Fisher*, 165 Wn.2d at 747.

Defense counsel's failure to object to prosecutorial misconduct at trial constitutes waiver

on appeal unless the misconduct is "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice'" and is incurable by a jury instruction. *Fisher*, 165 Wn.2d at 747 (internal quotation marks omitted) (quoting *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

B. Comment on the Right to Remain Silent

Dixon claims that the prosecutor's comments about Dixon's prearrest silence and his decision not to testify at trial violated his right to remain silent. Both the Fifth Amendment to the United States Constitution[4] and article I, section 9 of the Washington Constitution[5] guarantee criminal defendants the right to silence. A prosecutor may touch upon a defendant's exercise of a constitutional right, provided the prosecutor does not "'manifestly intend[ ] the remarks to be a comment on that right.'" *Gregory*, 158 Wn.2d 759 at 806-07 (quoting *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). Further, even if improper, a prosecutor's remarks do not require reversal when "they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1105 (1995).

Here, the prosecutor made statements concerning Dixon's lack of cooperation with the police in the context of Dixon leaving the crime scene when Calloway called the police. Juries may consider evidence of flight following the commission of a crime in determining guilt or

[4] In pertinent part, the Fifth Amendment provides, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

[5] Washington's Constitution provides, "No person shall be compelled in any criminal case to give evidence against himself." Wash. Const. art. I, § 9.

innocence. *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). Thus, the prosecutor properly invited the jury to draw negative inferences from evidence that Dixon fled the scene. Further, defense counsel implied during trial that Dixon was credible because he "was cooperative" and "didn't hide behind" "the right to an attorney and all that stuff" by waiving his rights and giving a statement to the police. RP at 78-79. The prosecutor's comments noting Dixon's initial unwillingness to stay on the scene and cooperate with the police were a pertinent reply to defense counsel's questions during trial. Additionally, even if the prosecutor committed misconduct by commenting on Dixon's choice not to testify, Dixon fails to demonstrate it was flagrant and ill-intentioned. The trial court instructed the jury that Dixon was not required to testify and that the jury could not use that fact to infer guilt in any way. We presume the jury followed these instructions. *State v. Anderson*, 153 Wn. App. 417, 432, 220 P.3d 1273 (2009), *cert. denied*, __ U.S. __, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). Accordingly, we hold that these comments did not rise to the level of prosecutorial misconduct.

C. Presumption of Credibility

Second, Dixon, citing *State v. Faucett*, 22 Wn. App. 869, 875, 593 P.2d 559 (1979), argues that the prosecutor committed misconduct by stating that the jury should presume Calloway's credibility until proven otherwise. It is improper for a prosecutor to state a personal belief as to the credibility of a witness. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). But we will not find prejudicial error "unless it is clear and unmistakable that counsel is expressing a personal opinion," *Warren*, 165 Wn.2d at 30, such as, "'I believe [the witness]. I believe him.'" *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (emphasis omitted) (quoting *State v. Sargent*, 40 Wn. App. 340, 343, 698 P.2d 598 (1985)). Here, when viewed in the context of the

prosecutor's entire argument, he did not clearly express his personal belief in Calloway's credibility. Rather, he generally stated that the jury should evaluate whether it had reasons to determine Calloway was not credible. Further, we held in *Faucett* that only the trial court's presumption of truthfulness instruction was improper because it could lead the jury to infer that the trial court believed or disbelieved a witness, thus constituting a judicial comment on the evidence in violation of article IV, section 16 of our state constitution. *Faucett*, 22 Wn. App. at 875-76. Although we caution that a prosecutor's statements suggesting a presumption of a witness's credibility could easily cross the line into misconduct, *Faucett* does not apply here and Dixon fails to demonstrate that the comment was improper.

Additionally, Dixon fails to demonstrate that any conduct by the prosecutor was improper or flagrant and ill-intentioned. The trial court instructed the jury that it was the sole judge of credibility, that the lawyers' arguments were not evidence, and that it was to disregard any statement or argument not supported by the evidence or the trial court's instructions. We presume the jury followed these instructions. *Anderson*, 153 Wn. App. at 432. Thus, Dixon's claim fails.

D. Comments on Intoxication

Finally, Dixon contends that the prosecutor's statements referring to the possibility that Dixon was intoxicated were improper, amounting to prosecutorial misconduct, because they assumed facts not in evidence and portrayed Dixon as a "drunk." Br. of Appellant at 44. But the prosecutor did not state that it would have proven Dixon was intoxicated had he not left the crime scene; he stated only the reasonable inference that he "probably" could have shown whether Dixon was intoxicated at the time the crime was committed had he remained at the scene. RP at

101. Thus, the argument was not improper. Further, the prosecutor's statements were a pertinent response to defense counsel's comparison between Thomas and Dixon and the implication that the evidence demonstrated that Dixon was not intoxicated. Thus, Dixon fails to demonstrate prosecutorial misconduct and his claim fails.

IV. Cumulative Error

Finally, Dixon argues that cumulative error requires reversal of his conviction. "Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless." *State v. Weber,* 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Here, any error was a harmless admission of a statement in violation of the confrontation clause that was merely duplicative of Dixon's own, admitted statement. His claim of cumulative error fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Armstrong, J.

Hunt, J.